

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

KRENSON KENNETH KNIPHFER
d/b/a Kniphfer Construction
Company
f/d/b/a B & K Trucking Company
Debtor

Chapter 7 Case

Number 88-41241

FILED

at 2 O'clock & 06 min. PM

Date 12/20/89

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

**MEMORANDUM AND ORDER ON PETITION FOR PRIORITY OF PAYMENTS
FILED BY SOUTHEASTERN MACHINERY, INC.**

On October 18, 1989, a hearing was held upon a Motion for Relief from Stay filed by Circle Business Credit, Inc., and a Petition for Priority of Payments filed by Southeastern Machinery, Inc. After consideration of the evidence adduced at trial, the briefs submitted by the parties, and the applicable authorities cited therein, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a petition under Chapter 13 of the

Bankruptcy Code with this Court on November 9, 1988. On or about December 20, 1988, Southeastern Machinery, Inc. ("Southeastern"), performed certain repairs to a bulldozer used in the operation of the Debtor's business, the reasonable and necessary cost of which totalled \$12,359.00. Southeastern subsequently received payment on this account in the amount of \$4,103.82, leaving due the sum of \$9,206.29, including interest. On June 5, 1989, Debtor voluntarily converted its case from Chapter 13 to a Chapter 7 liquidation. The repairs at issue were performed after the Debtor's petition for relief under Chapter 13 of the Code but before the conversion of this case to one under Chapter 7. At the time of performance of the work, Southeastern was not aware of the pendency of the present bankruptcy proceedings. The repair work performed by Southeastern consisted of rebuilding the transmission of the bulldozer and was necessary to maintain the machine. The repair work increased the value of the bulldozer from \$15,000.00 to approximately \$50,000.00 and permitted its use from December 20, 1988, until it was picked up in July of 1989. As a result of the Debtor's use of the bulldozer since December, 1988, more repairs are necessary and the bulldozer has a present market value of \$15,000.00. The currently necessary repairs would require substantial work, which would cost approximately \$20,000.00. The vehicle's value would then increase to approximately \$50,000.00. The Chapter 7 Trustee agreed to abandon the estate's interest in the bulldozer except that any money

remaining after payment of Circle Business Credit, Inc. ("Circle"), the secured creditor, and Southeastern should be returned to the estate.

At the hearing held on October 18, 1989, this Court approved the foreclosure and sale of the bulldozer and ordered the proceeds thereof to be held in escrow by Circle's counsel pending resolution of the issues raised by Southeastern's claims.

CONCLUSIONS OF LAW

This case centers upon a dispute between Southeastern, which claims an administrative priority to the proceeds of the bulldozer, and Circle which holds a purchase money security interest in the same.

There are two issues raised by the foregoing facts. First, whether Southeastern is entitled to an administrative expense claim under Section 503(b)(1)(A) of the Bankruptcy Code and second, if so, whether that administrative claim must be given priority status over Circle's rights in the bulldozer.

The Bankruptcy Code provides that administrative

expenses shall be allowed for "the actual, necessary costs and expenses of preserving the estate, including . . . services rendered after the commencement of the case." 11 U.S.C. Section 503(b)(1)(A). In certain circumstances, repairs to the property of the estate may be included in this type of administrative claim. See Generally, 3 Collier §503.04(1)(A)(i) (15th Ed. 1989). In considering this issue, Courts have outlined three relevant factors in determining whether a given expense qualifies for administrative expense status. First, the debt must have been incurred post-petition. Second, the claim must be between the claimant and the trustee or debtor-in-possession. Finally, the claim must have benefited the debtor in the operation of its business. In re Keegan Utility Contractors, Inc., 70 B.R. 87 (Bankr. W.D.N.Y. 1987). Upon examination of these factors, I find that Southeastern's claim is entitled to administrative expense status.

First, the debt was incurred between the commencement of the case under Chapter 13 and its conversion to a case under Chapter 7. Thus, the debt is clearly post-petition; the parties have stipulated to that matter. Regarding the second factor, that the claim must be between the claimant and the trustee or debtor-in-possession, Southeastern argues that although it contracted with neither the "debtor-in-possession" nor the trustee, in this case the Chapter 13 Debtor himself is the equivalent of a debtor-in-

possession, for the Debtor operates his business. Southeastern argues that since the debtor, not the trustee, employed labor and services for the preservation of the estate, and this element is satisfied. Circle, however, takes the position that since the term "debtor-in-possession" is a legal term defined by 11 U.S.C. Section 1101, it is explicitly applicable to Chapter 11 bankruptcies, and therefore should not be analogized to the Chapter 13 context. I disagree.

Focusing upon the language of Section 503(b)(1)(A), I find no indication that administrative expenses are limited to claims between claimants and trustees or debtors-in-possession. Section 503(a) states that "[a]n entity may file a request for payment of an administrative expense." 11 U.S.C. Section 101(14) defines "entity" as "includ[ing] person, estate, trust, [§101(14)] governmental unit, and United States Trustee." There is no language in either Section 503 or Section 101(14) which would exclude the allowance of administrative expenses to one who dealt directly with a Chapter 13 debtor. Hence I find that the analogy between the Chapter 13 debtor operating a business and a Chapter 11 debtor-in-possession satisfies the second Keegan factor.

Finally, the claim must have benefited the debtor in the operation of its business. It cannot be disputed that the

transmission repair work benefited the Debtor in his business. In the absence of this work, the bulldozer was simply unusable. Following the performance of the work, the Debtor used the bulldozer in his business for a period of several months. Thus it is clear that the transmission work did benefit the Debtor in the operation of his business. In light of the presence of each of the factors of the three pronged test for the allowance of an administrative expense, I find that the repairs performed by Southeastern do constitute an administrative expense under 11 U.S.C. Section 503.

Having determined that Southeastern's claim will be allowed as an administrative expense, I address the issue of whether Southeastern's claim will be entitled to be paid prior to Circle's secured claim from the proceeds of the sale of the bulldozer.

In general, administrative claims take priority over the general creditors of the estate, but cannot be recovered from assets pledged to secured creditors. Matter of Trim-X, Inc., 695 F.2d 296 (7th Cir. 1982). In some circumstances, however, such a recovery is proper. See 11 U.S.C. 506(c). The most concise version of the test for administrative expense recovery was set forth by the Ninth Circuit as a three prong test requiring that the expense be (1) reasonable, (2) necessary, and (3) beneficial to the secured creditor. In re Cascade Hydraulics and Utility Services, Inc., 815

F.2d 546, 548 (9th Cir. 1987). That test has been met in this case and recovery will be permitted from the proceeds of the sale.

The first two prongs of the Cascade test have clearly been satisfied. The bulldozer was inoperable before the repairs and was used by the Debtor in its business thereafter. The Debtor was engaged in the construction business and the need for a bulldozer in that business is obvious. Hence I find that these repairs were both reasonable and necessary.

The third prong of the Cascade test, that the expenses be beneficial to the secured creditor, while less obvious, is present. The Debtor was able to use the bulldozer to generate income toward payment of his obligations under the Chapter 13 plan. Circle did receive payments of \$550.00 through the Chapter 13 plan and, although slight in comparison to the overall secured debt, this does constitute some benefit to Circle. To satisfy Section 506(c), the Debtor must establish in quantifiable terms that it expended funds directly to protect and preserve the collateral, thus benefiting the secured party. Cascade, 815 F.2d at 548 [citing Brookfield Production Credit Association v. Borron, 738 F.2d 951, 952 (8th Cir. 1984).] The evidence shows that upon completion of the repairs the collateral's value was increased from the \$15,000.00 to \$50,000.00. At that point in time Circle clearly benefited by

that increase in value of the collateral. At that time, Circle also had the option to bring a motion to lift stay on grounds of lack of adequate protection. No such action was brought. The current repairs were to an entirely different component of the bulldozer than the original repairs done by Southeastern. There is no evidence before me to show that the necessity of the subsequent repairs is in any way caused by negligence of Southeastern in performing the original repairs. Southeastern did not hold a security interest in the bulldozer at issue and hence did not have the right or the obligation to monitor the use of the bulldozer. Circle did have that right. It failed to exercise it.

Because the repairs in question were post-petition, reasonable, necessary, and of benefit to both the secured creditor and the estate, I find that Southeastern has an administrative claim having priority over the claim of Circle to the proceeds of the sale of the bulldozer.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Southeastern Machinery, Inc., shall have an administrative claim having priority

over the claim of Circle Business Credit, Inc., to the proceeds of the sale of the bulldozer.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 18th day of December, 1989.